(10)

No. 98-7540

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT L. CARMELL,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas, Second District

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of petitioner Scott L. Carmell. Written consents of the parties to the filing of this brief have been submitted to the Court.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

This case presents the issue of when, if ever, the retroactive application of a new rule of evidence violates the

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

Ex Post Facto Clause. The NACDL contends that in certain circumstances, where such a retroactive application of an evidentiary rule leads to a conviction that would not otherwise have been obtained but for the rule change, the *Ex Post Facto* Clause has been violated. The NACDL is concerned that if this position is not adopted by this Court, then criminal defendants will be afforded no *ex post facto* protection from retroactively-applied changes to rules of evidence, a result that would be inconsistent with the intent of the Framers.

SUMMARY OF THE ARGUMENT

1. In his opinion in *Calder v. Bull*, 3 U.S. 386 (1798), Justice Chase set forth four categories of *ex post facto* laws that are now enshrined in this Court's *ex post facto* jurisprudence. Recently, in *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court made it clear that *ex post facto* violations are to be measured only by the *Calder* categories, which it viewed to be contemporaneous expressions of the Founders' intent regarding the *Ex Post Facto* Clause.

2. The fourth *Calder* category, which governs the outcome in this case, classifies as an *ex post facto* law: "Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Calder*, 3 U.S. at 390. This fourth category was not meant by Justice Chase to be some useless appendage to the other three categories. Instead, it was designed specifically to independently address the retroactive application of new evidentiary rules. Consistent with some of Justice Chase's discussion in *Calder*, and with the fundamental underpinnings of the *Ex Post Facto* Clause, the fourth *Calder* category

should be interpreted to prevent the retroactive application of a new rule of evidence when it is dispositive as to an ultimate finding of guilt.

ARGUMENT

I. DETERMINATIONS UNDER THE *EX POST FACTO* CLAUSE ARE GOVERNED BY ORIGINAL INTENT AS EVIDENCED BY JUSTICE CHASE'S OPINION IN *CALDER v. BULL*.

A. Introduction: The Four Categories of *Ex Post Facto* Laws.

Justice Chase's opinion in *Calder v. Bull*, 3 U.S. 386, 390 (1792), sets forth four categories of *ex post facto* laws[2] that are now enshrined in this Court's *ex post facto* jurisprudence:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at

[2] The Constitution provides: "No State shall ... pass any ... ex post facto Law...." U.S. CONST. art. I, § 10, cl. 1.

the time of the commission of the offence, in order to convict the offender.

At issue in this case is the continuing viability and meaning of the fourth *Calder* category. As demonstrated below, that category retains significance and should be interpreted to prevent the retroactive application of changes in the rules of evidence in cases where such changes are dispositive as to a defendant's conviction.

B. The Significance of *Collins v. Youngblood.*

In *Collins v. Youngblood*, 497 U.S. 37 (1990), a case involving the retroactive application of a Texas statute allowing for the reformation of an improper verdict that assesses unauthorized punishment, this Court clarified the state of *ex post facto* law and laid the framework for the determination of the issue presented by this case.

After setting forth the *Calder* factors and discussing some of the historical background of the *Ex Post Facto* Clause, the Court in *Collins* noted that the Texas statute under consideration effected a "procedural change" in Texas law. 497 U.S. at 44. The Court continued:

> Several of our cases have described as "procedural" those changes which, even though they work to the disadvantage of the accused, do not violate the *Ex Post Facto* Clause. While these cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as

> opposed to changes in the substantive law of crimes. Respondent correctly notes, however, that we have said that a procedural change may constitute an ex post facto violation if it affects matters of substance, by depriving a defendant of substantial protections with which the existing law surrounds the person accused of crime, or arbitrarily infringing upon substantial personal rights.

Collins, 497 U.S. at 45 (citations, internal quotations and brackets omitted). The Court then commented: "We think this language from the cases cited has imported confusion into the interpretation of the *Ex Post Facto* Clause." *Id.*

Therefore, in order to clarify the perceived confusion as to the meaning of the *Ex Post Facto* Clause, especially as it is implicated by the retroactive application of procedural changes of law, the Court made it clear that *ex post facto* violations are to be measured only by the *Calder* categories.

> We think the best way to make sense out of this discussion in the cases is to say that by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause.... [T]he constitutional prohibition is addressed to laws, whatever their form, which make innocent acts criminal, alter the nature of the offense, or increase the punishment. <u>But the prohibition which may not be evaded is the one defined by the *Calder* categories</u>.

Id. at 46 (citations and internal quotations omitted; emphasis added). Indeed, the Court in *Collins* unmistakably viewed the *Calder* factors as embodying the intent of the Founders. *See id.* at 50 (overruling *Kring v. Missouri*, 107 U.S. 221 (1883), "The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which 'alters the situation of a party to his disadvantage.' We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases.").

Therefore, there can be no question that the outcome of this case is dictated by the four *Calder* categories, and in particular, the fourth such category. Although, as discussed below, the viability of the fourth category in the circumstances of this case has been called into question, the original intent of the Framers, as evidenced by Justice Chase's opinion in *Calder*, was that the *Ex Post Facto* Clause should be applied to prevent convictions obtained as a direct result of the retroactive application of a new or changed rule of evidence.

II. UNDER THE FOURTH CATEGORY OF *CALDER V. BULL*, THE RETROACTIVE APPLICATION OF A NEW RULE OF EVIDENCE THAT IS DISPOSITIVE AS TO A FINDING OF GUILT IS PROHIBITED.

A. The Viability of the Fourth *Calder* Category.

On its face, the fourth *Calder* category -- "Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender" -- applies in this case. The 1993 amendment to Article 38.07 of the Texas Code of Criminal Procedure, retroactively applied by the Texas trial court in this case, enabled the jury to hear uncorroborated testimony of K.M. that otherwise would have been prohibited under the version of that statute extant at the time of the June 1992 offense at issue here. There can be little question that Petitioner would not have been convicted of that offense but for the testimony of K.M. Consequently, the 1993 amendment "alter[ed] the legal rules of evidence, and [allowed for] ... different testimony [*i.e.* the uncorroborated testimony of K.M.] than the law required at the time of the commission of the offence, in order to convict the ... [Petitioner]."

However, in a footnote in *Collins*, *supra*, this Court called into question the viability of the fourth *Calder* factor: "The *Beazell* [*v. Ohio*, 269 U.S. 167 (1925)] definition [of the meaning of the *Ex Post Facto* Clause] omits the reference by Justice Chase in *Calder v. Bull* to alterations in the 'legal rules of evidence.' As cases subsequent to *Calder* make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." *Collins*, 497 U.S. at 43 n.3 (citations omitted).[3]

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[3] In *Beazell*, this Court summarized the meaning of the *Ex Post Facto* Clause as follows:

> It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at

Nevertheless, in light of (1) the Court's decision in *Collins v. Youngblood*, as discussed above, requiring the determination of all alleged *ex post facto* violations by measurement against the *Calder* categories, and (2) the fact that the fourth *Calder* category had independent significance at the time of the *Calder* decision, footnote 3 of *Collins* should not be read as blanket authority for the retroactive application of new rules of evidence. Instead, consistent with the tenor of *Collins*, and to preserve some viability of the fourth *Calder* category, that footnote should be interpreted simply to mean that the fourth category "was not intended to prohibit [in every circumstance] the application of new evidentiary rules in trials for crimes committed before the changes." *Collins*, 497 U.S. at 43 n.3.

The fourth *Calder* category was not devoid of meaning at the time that it was first discussed in *Calder*. Indeed, Justice Chase, in addressing the historical background of the *Ex Post Facto* Clause, expressly discussed historical examples of *ex post facto* changes in evidentiary rules:

> The prohibition against their [*i.e.* the state legislatures'] making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws.... Sometimes they respected the crime, by declaring acts to be treason, which were not

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the time when the act was committed, is prohibited as *ex post facto*.

269 U.S. at 169-70.

> treason, when committed, at other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit.

Calder, 3 U.S. at 389 (footnotes deleted; emphasis added). Justice Chase went on to state that it was "[t]o prevent such, and similar, acts of violence and injustice, ... [that] the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any *ex post facto* law." *Id.*

Therefore, it is clear that the fourth *Calder* category was not meant by Justice Chase to be some useless appendage to the other three categories. Instead, the fourth category was designed specifically to independently address the retroactive application of new evidentiary rules. Accordingly, because *Collins* expressly pegs *ex post facto* violations to the *Calder* categories, and because the fourth category applicable here had independent meaning when it was first set forth, that category must retain viability.

B. The Meaning of the Fourth *Calder* Category.

The question remains: what is the meaning of the fourth *Calder* category? Although Justice Chase did not provide a definitive analysis, he did provide indications that the meaning of that category is that which is urged in this brief: that a retroactive application of a rule of evidence that is dispositive regarding an ultimate finding of guilt violates the

Ex Post Facto Clause. First, synopsized, the very words of the fourth category prevent the retroactive application of any "law that alters the legal rules of evidence ... in order to convict the offender." *Calder*, 3 U.S. at 390 (emphasis added). Moreover, Justice Chase also wrote: "I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction." *See also* Derek J.T. Adler, *Ex Post Facto Limitations in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 Fordham L. Rev. 1191, 1211 (1987) ("An evidentiary change may also run afoul of the *ex post facto* prohibition if it increases the likelihood of conviction to such an extent as virtually to guarantee it.").[4]

Thus, in the ordinary course, as suggested in footnote 3 of *Collins*, a simple change in a rule of evidence will not, in the vast majority of cases, violate the *Ex Post Facto* Clause. The rules prescribing the methods and means of the presentation of evidence rarely have a direct influence on the outcome in a criminal case. However, when a change of such a rule is dispositive as to a finding of guilt, that change is qualitatively different from an ordinary evidentiary rule change. Fundamentally, whether it is applied to a change of substantive law or of a law of evidence, the *Ex Post Facto*

[4] Cases of this Court upholding the retroactive application of a change in an evidentiary rule are not inconsistent with the rule proposed here. *See Hopt v. Utah*, 110 U.S. 574 (1884) (change of rule newly authorizing the admission of testimony of felons); *Thompson v. Missouri*, 171 U.S. 380 (1898) (changing rule to authorize admission of handwriting exemplars). Although they are silent on the point, neither *Hopt* nor *Thompson* suggests that the changes of evidentiary rules at issue were dispositive as to conviction.

Clause is designed to prevent convictions and increases in punishment based on the retroactive application of such changes. In essence, the *Ex Post Facto* Clause is an adjunct to the Due Process Clause in that it constitutionalizes a rule of fairness. *See Calder*, 3 U.S. at 389 (the *Ex Post Facto* Clause is designed "[t]o prevent such, and similar, acts of violence and injustice") (emphasis added), and at 390 (referring to the four categories of *ex post facto* laws, Justice Chase stated: "All these, and similar laws, are manifestly unjust and oppressive.") (emphasis added). And there should be no constitutional difference between a conviction achieved through a retroactively-applied change of the elements of an offense and one obtained through a retroactively-applied change of a rule of evidence -- the result is the same: a conviction that would not have been obtained under the law prevailing at the time of the conduct in question.

The rule proposed here is not some amorphous standard of fairness. Instead, it would measure challenges to retroactive applications of changes in rules of evidence by the significance of the effect that those changes had on the ultimate outcome: conviction. Therefore, if the proposed rule were adopted by this Court, then courts would be required simply to employ a test that mirrors the time-honored harmless error test used by the Courts of Appeals every day to determine the significance of errors committed in criminal cases. *See* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *Chapman v. California*, 386 U.S. 18, 24 (1967) (error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). Courts of Appeals regularly make determinations under the harmless error rule as to the prejudicial nature of erroneously admitted evidence,

and there is no reason why they cannot perform a similar task in evaluating the constitutional significance of retroactively-applied rules of evidence.

CONCLUSION

The judgment of the Court of Appeals of Texas, Second District, should be reversed.

Respectfully submitted,

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